AH TEH & ANOR.

v.

DR. R. VASUDEVAN

HIGH COURT MALAYA, JOHOR BAHRU
MAHADEV SHANKAR J
[CIVIL SUIT NO. 478 OF 1978]
12 OCTOBER 1986

LANDLORD AND TENANT: *Claim for vacant possession and mesne profits - Tenancy for indefinite period - Whether void for non-registration - Whether equity can enforce the tenancy - Validity of notice to quit - Retention of deposit after expiry of tenancy - Whether the retention evidence of new tenancy.*

The plaintiffs' mother entered into a tenancy agreement with the defendant for a period of 10 years commencing from 17 February 1961 at a monthly rental of RM280. Among others, Clause 3 of the agreement provided that the defendant sub-let the said ground floor indefinitely. Clause 7 provided that in case the defendant failed to pay monthly due rents regularly, it was agreed that the plaintiffs' mother shall terminate the agreement, by giving three months' notice to the defendant. In consideration of the agreement the defendant paid a sum of RM3,000 to the plaintiffs' mother. The agreement was not registered. At the end of 10 years the agreement was not determined. The sum of RM3,000 was not refunded. In 1973, the plaintiffs' mother transferred the premises to the plaintiffs. Between 1973 to 1977 the plaintiffs suggested to the defendant for an increase in the rent. The defendant declined to pay. In 1977 the plaintiffs through their solicitors issued notice under Clause 7 to quit to the defendant demanding the defendant to quit on 31 March 1977 or 3 months from the time of service. The defendant did not comply with the notice to quit. Subsequent to the notice to quit, rent was paid by the defendant to the plaintiffs.

The plaintiffs claimed for vacant possession and mesne profits on the ground that the agreement was void for non-registration. The defendant disputed the validity of the notice to quit and claimed that the tenancy was for an indefinite period in accordance with Clause 3 above and further counter-claimed to enforce the tenancy agreement under the doctrine of equity that the tenancy was valid as long as the law allows i.e., for 30 years ending only in 1991 at RM280 per month.

Held:

[1] The notice to quit must determine when the tenancy itself determines. It follows that the notice to quit is invalid since it determines the tenancy on 31 March 1977 instead of 16 of the month. The notice to quit being invalid, the plaintiffs' claim was dismissed.

[2] In the absence of any evidence to the contrary, the retention of RM3,000 by the plaintiffs shows that a tenancy continued after 1971. It entitles the defendant a right in equity to something more than a month to month tenancy and therefore cannot be determined by a month's notice.

[3] Equity must be adaptable to the needs of the case. As the present market value of the said premises is RM1,400 per month, it is unfair to allow the defendant to continue the tenancy indefinitely at RM280 per month. Equity requires that the plaintiffs shall be entitled immediately to terminate the tenancy upon giving three clear months' notice to determine on the 16 day

of 3 month thereafter. At the end of that period, the defendant shall be entitled to a refund of RM3,000. However if the defendant gives notice to the plaintiffs that he is relinquishing his claim to the refund of RM3,000, he shall be entitled to stay for a further 6 months rent free.

[Claim and counterclaim dismissed. No order as to costs.]

Cases referred to:
Subramaniam v. PP [1956] MLJ 220
Veeriah v. Mal Singh [1969] 2 MLJ 93
Yong Tong Hong v. Siew Wah & Ors. [1971] 2 MLJ 105
Kheng Soon Finance Sdn. Bhd. v. M.K. Retnam Holdings [1983] 2 MLJ 384

Legislation referred to:
Civil Law Act 1956, s. 6
Land Enactment 1935 (Johore), s. 63

Other sources referred to:
Malaya Law Review, S.Y. Wong, 1971, p. 294
A Commentary on National Land Code, Judith Sihombing, p. 402

For the plaintiffs - Ho Thian Cheh; M/s. Ho Thian Cheh & Co.
For the defendant - S.V.K. Singham; M/s. Singham & Co.

JUDGMENT

Mahadev Shankar J:

This is a claim by a landlord against the tenant for vacant possession following a notice to quit and for mesne profits. Dr. R. Vasudevan ('the tenant') was a medical officer in the Kluang government hospital. He retired in 1961. He wanted to go into private practice. For this he needed premises which he intended to occupy on a long term basis. Goodwill is a necessary adjunct of a medical practice. And this has to be built up over the years.

With all this in mind, the tenant approached Madam Yong Hoe Lock @ Yong Hor Loke (f) in 1961 for a tenancy on the ground floor of the premises No. 29, Jalan Dato' Captain Ahmad, in Kluang. She did not speak English or Malay. She suggested that a tenancy agreement be drawn up by her solicitors M/s. C.P. Wong & Co. The Tenant agreed. A written lease was drawn up. The material terms of this document were:

1. That the rent should be RM280 per month and the tenancy should commence from 17 February 1961 up to 16 March 1961 and thereafter from month to month from 17 of each month to the 16 of the following month.

2. Clause 3 provided:

   It is hereby agreed 2nd party sub-let the said ground floor indefinitely.

3. And Clause 7 provided:

   That in case if the 2nd party fails to pay the monthly due rents regularly it is hereby agreed that the 1st party shall terminate this agreement by giving three months' notice to the 2nd party.

In consideration for this arrangement, the tenant paid a sum of RM3,000. The lease was accompanied by an acknowledgment which was incorporated into the end of the document and read as follows:

> In pursuance of an Agreement dated 10 February 1961, entered between Dr. R. Vasudevan of Jaya Clinic of Kluang, and myself, in respect of the ground floor of premises No. 29 Jalan Dato Capt. Ahmad, Kluang, regarding the sub-letting of the ground floor of the above-said premises I, the undersigned, Yong Hoe Lock @ Yong Hor Loke (f) do hearby declare and state that I have today received a sum of dollars Three Thousand only (RM3,000) from the said Dr. R. Vasudevan of Jaya Clinic as deposit in respect of same, and which sum shall be returned to him on completion of 10 years of the said agreement referred to above from date hereof.

What happened at the end of the 10 years after the commencement of the tenancy is disputed and will be dealt with shortly. In the event however the deposit of RM3,000 has not been refunded to the tenant to this day.

In 1973 Madam Yong Hoe @ Yong Hor Loke transferred the land on which the premises stood, to her son and daughter who are the plaintiffs in this action. They are jointly referred to hereafter as 'the landlord'. Clause 9 of the tenancy agreement provided that reference to the parties should include their heirs, successors in title, and assigns.

At all material times the son was the rent collector. He speaks fluent English. Between 1973 and 1977 he suggested to the tenant on three or four occasions that the rent for the premises should be increased. But the tenant tactfully declined on each occasion by saying that he would think about it.

By 1977 the landlord grew tired of waiting. Solicitors were consulted and a notice to quit was issued. It read as follows:

> We act for Ah Teh @ Lee Ah Teh and Lee Moy Moy who are the registered proprietors of the premises known as No. 29, Jalan Dato' Capt. Ahmad, Kluang.
>
> We are instructed by our clients that by virtue of an Agreement made on 10 February 1961 Yong Hoe Lock @ Yong Hor Loke (f) as the 1st party and yourself as the second party you took the whole ground floor premises at a monthly rental of RM280 payable in advance.
>
> We are to inform you that the Agreement is that for a monthly tenancy which could be terminated by one calendar month's notice. However, as you have been in occupation of the premises since February 1961 our clients are amenable to giving you three months' notice. Please note that the Agreement is in fact not binding on our clients as the same is not registered with the Commissioner of Lands & Mines.
>
> On behalf of our clients we request of you to quit and deliver possession of the aforesaid premises on or before 31 March 1977.
>
> Take Notice that if you fail to comply with this notice terminating your tenancy on the 31 March 1977 or at the expiration of three months from the time of service of this notice, our instructions are to issue a summons against you for recovery of possession of the above premises for double rent at the rate of RM560 per month for holding over as from 1 April 1977, and for costs. You are required to settle your rent and any arrears thereof before the said date.

Straddling across a substantial part of the period for which notice to quit was given, rent was collected for which 4 receipts were put in evidence. These were for the months of 17 November to 16 December, 17 December to 16 January, 17 January to 16 February, and 17 February to 16 March.

The tenant did not comply with the notice to quit. He continued in occupation. The monthly rent was paid and received on a without prejudice basis.

A suit was filed. The claim for vacant possession was based quite simply on the failure of the tenant to comply with the notice to quit.

The tenant denied the validity of the notice to quit. He claimed that since the lease was for an indefinite period the landlord was not entitled to terminate as long as the faithfully observed all the terms and conditions of the lease agreement. And notwithstanding that the lease may have been void for non-registration, a counterclaim was made to enforce an equity which the tenant said he had in the circumstances for a lease for as long as the law allows i.e., for 30 years.

All the facts were common ground except what happened at or about the time when 10 years had elapsed from the commencement of the tenancy.

Madam Yong Hoe Lock's son, and one of the plaintiffs in the present matter, said in evidence that his mother had told him that she had taken a Mr. Yong Kim Chin who spoke English with her to see the tenant. They had a discussion. It was then agreed that in return for the tenant continuing in occupation on a month to month basis, Madam Yong Hoe Lock was entitled to keep the RM3,000.

Defendant's Counsel strongly objected to this evidence being admitted on the ground that it was pure hearsay. However, at the time I overruled the objection on the grounds that the evidence may be admissible to explain the conduct of the plaintiffs even if it was not proof of the truth of the contents therein (see *Subramaniam v. PP* [1956] MLJ 220). Besides the tenant had not yet given evidence at that point in time. Neither the mother nor Mr. Yong were available to be called as witnesses at the trial because both of them were dead.

But when the tenant's turn came to give evidence, he categorically denied that there was any such discussion. He said that after the tenancy agreement was signed by the mother and in his presence, he had never again met or spoken to that woman thereafter. Rent and all tenancy matters were dealt with throughout between him and the son, Mr. Lee Ah Teh.

If the tenant had admitted that such a conversion took place, there would have been direct evidence of the truth of the contents of such a conversation. In view of his denial, however, there was no direct evidence whatsoever on the point. Consequently the Court was left to infer from the other evidence, whether on the balance of probabilities, the parties had agreed to any such agreement as submitted by the plaintiffs.

Mr. Ho for the plaintiffs submitted that since the acknowledgment was limited to a period of 10 years, there must have been some negotiations between the plaintiffs' mother and the tenant as to the terms on which the tenancy was to continue. He said that since rent was collected monthly thereafter and no new written agreement was made, it must be inferred that there was indeed such an agreement.

With respect, I am unable to agree. The inference is equally open, that wishing to retain the RM3,000 the plaintiffs' mother was content to let things carry on as they were. The doctor's evidence on the point is not contradicted. And what is more, the terms of the notice to quit make it clear that the plaintiffs' solicitor was not instructed that the written agreement had become of academic interest when the 10 year period expired because it had been superseded by an oral agreement. On the contrary the notice to quit takes cognizance of the agreement but seeks to overcome the obstacles it created in terms of an indefinite tenancy, by a plea that the agreement was void for non-registration.

In sequence, I must now deal with the validity of the notice to quit.

The law is too well established that a notice to quit must determine on the date when the tenancy itself determines. In the present case, the last day of the periodic monthly tenancy was 16 of the month, and therefore any notice to quit which was given, to be valid, should have determined on that day. Here a notice of approximately two and a half months was given, the last date of which was made to coincide with the last date of the calender month of March 1977. What is more, a demand was made for arrears of rent up to 31 March 1977. These defects in my view invalidated the notice.

Mr. Ho sought to overcome these problems by relying upon the case of *Veeriah v. Mal Singh* [1969] 2 MLJ 93. Whilst the giving of a longer period than required by the tenancy does not invalidate the notice, the notice must be made to expire at the end of some current period of the tenancy (see p. 94 1st column at A). This requirement was not fulfilled, and it was ambiguous whether the notice expired on 31 March 1977 or an 4 April.

So the notice to quit, being invalid, the plaintiffs' claim fails and has to be dismissed.

But the counterclaim has to be dealt with. The tenant claims that in equity he is entitled to a 30 year lease from the date of inception of this tenancy and that this Court must compel the plaintiffs to execute a document which gives him such a legal right. In this context, the defendant relied wholly on the judgment of H.T. Ong CJ in *Yong Tong Hong v. Siew Soon Wah & Ors.* [1971] 2 MLJ 105. His judgment was upheld by the Privy Council (see [1973] 1 MLJ 133). Mr. Singham of Counsel for the defendant also drew my attention to the Article by S.Y. Wong in [1971] *Malaya Law Review* p. 294, and Judith Sihombing's comments in her book *A Commentary on National Land Code* p. 402.

Mr. Ho sought to exclude the effects of the decisions aforesaid by relying on s. 6 of the Civil Law Act 1956. With respect, it is the view of this Court that s. 6 of the Civil Law Act 1956 was intended to exclude the statutory law of England dealing with matters relating to Land Law. The primary target was the Law of Property Act 1925, but of course English legislation on such matters has always been particularly prolific.

But with respect of Mr. Ho, the doctrine of equitable interference where legal remedies have fallen short of providing justice, is too well entrenched in Malaysia to be regarded as some esoteric branch of English law. This is so even in its application to matters covered by the National Land Code: See *Kheng Soon Finance Sdn. Bhd. v. M.K. Retnam Holdings* [1983] 2 MLJ p. 384. Equity is not a cloistered virtue. To argue that s. 6 of the Civil Law Act displaces the effect of the judgment of H.T. Ong CJ aforesaid and the Privy Council which upheld him, is to ignore s. 5 of the Act and to overlook the fact that *Inwards v. Baker* was being cited not as binding authority in Malaysia but as of the highest persuasive value.

It follows from what I have said that it is the opinion of this Court that the payment of RM3,000 entitled the tenant to a right in equity against his landlord to something more than a mere month to month tenancy. It is inconceivable that when the 10 year period expired in 1971, the tenant allowed the landlord to retain the RM3,000 for a mere right to a monthly tenancy which could be determined the following month on a month's notice.

On the other hand, when there is evidence before the Court that the market rental of comparable premises in Kluang today is RM1,400 per month or thereabouts, it does look quite unfair to allow the tenant to continue indefinitely at RM280 per month.

Like the human hand which has not become atrophied by specialisation, the hand of equity must be adaptable to the needs of the case.

In real value terms three thousand 1961 dollars would be worth very much more in 1986. But as a matter of simple arithmetic, if that sum had been put on fixed deposit at 8% per annum and compounded yearly, it would have yielded a gross of principal plus interest of RM6,476.78 in February 1971, RM10,277.83 February 1977, and RM21,247.16 in October 1986. Had this case been heard in 1971. I would have been compelled to address my mind to the period for which the tenant should have been given security of tenure.

However he has already been in occupation for 25 years and I am not really inclined to invoke the equitable jurisdiction of this Court to let him continue in occupation till 1991 at RM280 per month.

I have taken note of s. 63 of the Johore Land Enactment 1935 cited by plaintiffs' Counsel. That law was in effect in 1961 when the tenancy agreement was made. It provides that leases in excess of a year, if unregistered, are void.

In the exercise of my equitable jurisdiction, I declare that the landlord shall be entitled immediately to terminate this tenancy upon giving three clear months' notice to determine on 16 day of the 3 month thereafter. At the end of that period, the tenant shall be entitled to a refund of his deposit of RM3,000. If, however, he gives notice to the landlord in writing within the notice period that he is relinquishing his claim to a refund of the said money, I declare that he shall be entitled to stay a further six months in the premises rent free but in that event he shall be regarded as a trespasser if he holds over from the expiry of the 16 day of this further period of six months. The landlord shall in that event be entitled to apply to the sheriff of this Court to evict him from the premises.

Costs in any matter have always been in the discretion of the Courts. As I have dismissed the claim on pure legal grounds, the landlord will not have his costs of the claim. Since I take the view as regards the counterclaim that the insistence of the tenant of wanting to continue in occupation at RM280 per month was quite unreasonable, I therefore make no order for costs on the counter-claim.

The order of the Court will therefore read accordingly.

Also found at [1987] 1 CLJ 568